

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

NATIONAL HOT ROD ASSOCIATION	)	
(NHRA),	)	
	)	
Respondent,	)	Case Nos.: 02-CA-185569
	)	22-CA-190221
and	)	22-CA-192686
	)	
INTERNATIONAL ALLIANCE OF	)	
THEATRICAL STAGE EMPLOYEES,	)	
(IATSE)	)	
	)	
Charging Party.	)	

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NATIONAL HOT ROD ASSOCIATION	)	
(NHRA),	)	
	)	
Employer,	)	Case No.: 22-RC-186622
	)	
and	)	
	)	
INTERNATIONAL ALLIANCE OF	)	
THEATRICAL STAGE EMPLOYEES,	)	
(IATSE)	)	
	)	
Petitioner.	)	

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

COMES NOW, Respondent National Hot Rod Association, (“NHRA”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, and files the following exceptions to the November 9, 2018 Decision (the “Decision”) of Administrative Law Judge (“ALJ”), Benjamin W. Green:

## **Exceptions to the ALJ's Findings Relating to Respondent's Objections to the Election**

NHRA takes exception to:

1. The ALJ's finding and/or conclusion that the Respondent's election objections should be rejected and "do not constitute a basis for rerunning the election conducted in Case 29-RC-186622[,]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 32-33; 2: 9-10; 25: 3-4.)

2. The ALJ's finding/conclusion that "[o]n November 15, the NLRB mailed ballots to the production crews by United States mail[,]" on the grounds that this finding/conclusion is not supported by the evidence on the record. (JD 14: 33.)

3. The ALJ's failure to give sufficient weight to the testimonial and documentary evidence of election irregularities, on the grounds that such record evidence overwhelmingly supports the need for a rerun election given the factual context presented herein. (JD 24-27.)

4. The ALJ's finding and/or conclusion that individual voters bore responsibility for ensuring the fairness of the election, on the grounds that this misstates the law and creates an unprecedented and heavy affirmative burden on voters that is erroneous as a matter of law. (JD 24-27.)

5. The ALJ's finding and/or conclusion that eligible voter Todd Veney was obligated to track his ballot after mailing it and that his failure to present the results of the tracking at the hearing meant that "we do not have evidence that could be expected to resolve the matter[,]" and thus finding that the Respondent did not meet its burden of "establishing that the Board's mail intake process was the reason that Veney's ballot was not counted[,]" on the grounds that this finding and/or conclusion is erroneous as a matter of law. (JD 25: 47-51; 26: 1-4.)

6. The ALJ's findings/conclusions relating to eligible voter Robert Logan's attempts to secure a duplicate ballot after his did not arrive in the mail, including his finding that Logan "called the Region's main number twice on Wednesday, November 23 at 11:31 and 11:55 a.m. (1 and 3 minute calls, respectively) and once on Friday, November 25 at 3:21 a.m. (3 minute call)" and his finding that "I find it likely that he called [Board Agent] Flores on [November 28,]" on the grounds that these findings and/or conclusions are not supported by the record. (JD 16: 39-42; 17: 5-6; 17: fn. 17.)

7. The ALJ's finding and/or conclusion that "it is hard to argue that [Logan] could not have made additional efforts to reach the Board" and that accordingly, Logan's "failure to vote" could not be attributed to the Board, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 22-28.)

8. The ALJ's finding and/or conclusion that "any issue regarding [Logan's failure to vote] is outweighed by the interest in a prompt completion of the representation proceeding[,]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 26-28.)

9. The ALJ's reliance on the fact that voter Nathan Hess, unlike Logan, "was able to successfully place a 2-minute call to the same Regional phone number Logan used and receive a replacement ballot in time for him to vote" as evidence that the election irregularities were not significant, or the Logan did not make sufficient effort to secure a ballot, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 20-22.)

10. The ALJ's finding and/or conclusion that "the same rational [*sic*] which applies to Logan applies to [eligible voter Paul] Kent in that the situation required Kent to make more than a

single call and send a single email to obtain a replacement ballot” and that accordingly, “Kent's failure to have his vote counted” could not be attributed to the Board, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 35-37; 42-44.)

11. The ALJ's finding and/or conclusion that “since the evidence does not indicate that Kent was making arrangements to obtain his mail between November 25 and December 4, it does not appear that Kent would have been able to mail a timely ballot for receipt before the December 2 count (even if a replacement ballot was mailed to him much earlier)[.]” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 35-41.)

12. The ALJ's finding and/or conclusion that “any issue regarding [Kent's failure to have his vote counted] is outweighed by the interest in a prompt completion of the representation proceeding[.]” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 43-44.)

13. The ALJ's finding and/or conclusion that “the delay [in receiving eligible voter Patrick Ward's ballot] cannot be attributed to the Board” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 26: 51; 27: 1.)

14. The ALJ's finding and/or conclusion that “the lengthy period between [Ward's] ballot being postmarked (December 1) and being stamped received (December 9) matters little since it is highly unlikely that a ballot mailed on December 1 would arrive at the Regional office in time for the count on December 2” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 1-4.)

15. The ALJ's finding and/or conclusion that the evidence was not “sufficient to

establish that the Board disenfranchised Ward” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 4-5.)

16. The ALJ’s failure to take into account the fact that Respondent was foreclosed from calling Board Agents to testify as to the conduct of the Region and the operation of the mail ballot election, and his resultant findings that the record does not contain sufficient evidence of error relating to the handling of the election, on the grounds that these findings and/or conclusions are erroneous as a matter of law. (JD 24-27; *e.g.*, finding that “[t]he record contains no evidence that the Region failed to mail Veney’s ballot on November 15[;]” (JD 25: 39-40); finding that, while “[t]he evidence does suggest that either the U.S. postal service or the Region erred in its handling of Veney’s ballot[;]” Respondent still failed to meet its burden in “establishing that the Board’s mail intake process was the reason that Veney’s ballot was not counted[;]” (JD 25: 44-45; 36: 2-6); finding that, although it was “somewhat odd” that a ballot would be postmarked as sent on December 1, but not marked as received by the Region until December 9, “the delay cannot be attributed to the Board[;]” (JD 26: 51; 27: 1); while noting that it was “not optimal” that Logan’s replacement ballot was not sent for almost a week after Logan began leaving messages for the Region, nonetheless finding that his failure to vote was not attributable to the Region (JD 26: 18-20; 26-29.))

17. The ALJ’s failure to give sufficient legal weight to the closeness of the vote in the election, on the grounds that this factor overwhelmingly supports the need for a rerun election given the factual context presented herein. (JD 24-27.)

18. The ALJ’s failure to give sufficient weight to the fact that at least four voters, a determinative number, were denied the opportunity to cast ballots in the election due to election irregularities, on the grounds that this factor overwhelmingly supports the need for a rerun election

given the factual context presented herein. (JD 24-27.)

**Exceptions to the ALJ's Findings Relating to the Termination of Nathan Hess**

NHRA takes exception to:

19. The ALJ's finding and/or conclusion that NHRA "engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act by, on September 14, discharging Nathan Hess because of his union support and/or activity[,]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 25-27; 2: 10-11; 21: 25-26; 24: 32-33.)<sup>1</sup>

20. The ALJ's finding and/or conclusion that the General Counsel established a prima facie case that the Respondent knew of Hess's union activity and discharged him on that basis "given the timing of the discharge shortly after the Respondent learned of the organizing campaign, the abrupt nature of the discharge without significant investigation, the sudden promotion of an EVS operator with no tape producer experience and limited availability, the failure to offer a consistent explanation for discharging Hess, and other evidence of pretext[,]" as this conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 9-14.)

21. The ALJ's reliance on general, circumstantial evidence to establish the necessary element of knowledge, despite his acknowledgment that the record did not contain any actual evidence of the Respondent's knowledge of Hess's union activity, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 22: 1-2; 22: fn 19.)

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<sup>1</sup> Citations to the ALJ's Decision are formatted as follows: (JD 2: 2-5) refers to page 2, lines 2 through 5 of the Decision.

22. The ALJ's finding and/or conclusion that the fact that Respondent did not want its employees to unionize, along with three statements made after Hess's termination and alleged as unlawful by the General Counsel, constitute evidence that "tend[s] to support a finding of knowledge" of Hess's union activity, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 22: 6-7.)

23. The ALJ's reliance on the timing of Hess's discharge and stating that the timing "suggests knowledge and a discriminatory motive[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 22: 9-10.)

24. The ALJ's finding and/or conclusion that Hess's discharge was "abrupt and rushed" and undertaken "without significant investigation[.]" his description of the investigation, and his substitution of his own judgment for that of the Respondent's, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 22: 14-27; 22: fn 20, fn 21.)

25. The ALJ's finding and/or conclusion that the Respondent's "rush to discharge Hess without a reasonable investigation of the incident, shortly after it learned of an unwanted union organizing campaign, strongly suggests knowledge of his union activity and a discriminatory motive for doing so[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 23: 1-3.)

26. The ALJ's finding and/or conclusion that the Respondent "failed to provide Hess with a contemporaneous reason for his discharge that was consistent with its defense at trial[;]" and his related findings that Respondent did not "mention the missing clips in explaining to Hess the reason for his discharge" and that Respondent offered "inconsistent and shifting reasons for discharging Hess" which provided "strong evidence" of pretext, knowledge, and animus, on the

grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 23: 5-8; 23: 47-24: 1; 23: 14-16.)

27. The ALJ's finding and/or conclusion that Hess's discharge was "more suspicious" given Respondent's choice of a replacement, and his related finding that "the Respondent suddenly promoted a person with no tape producer experience and limited availability without having thoroughly investigated the incident which purported to disqualify Hess for the tape producer position is confounding and suggestive of pretext[.]" and his questioning why Respondent did not promote another EVS Operator to the job, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 23: 19-32; 23: fn 22.)

28. The ALJ's finding and/or conclusion that "the General Counsel's theory of the facts is more likely[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 23: 42.)

29. The ALJ's finding and/or conclusion that "the evidence suggests that the Respondent has attempted to elevate what, at the time, was a relatively minor incident that did not warrant significant investigation into a dramatic act of misconduct for purposes of presenting a pretextual defense at trial[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 3-6.)

30. The ALJ's rejection of the Respondent's *Wright Line* defense, and his related finding that the Respondent's stated reason for the discharge was pretextual and that "the second step of a *Wright Line* analysis is not necessary if the Respondent's stated reason for discharging the discriminate [...] has been rejected as pretextual[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 16-30.)

31. The ALJ's finding and/or conclusion that "[t]he record does not specifically indicate that Hess did anything wrong from September 1 to 5 other than, arguably, his failure to air the missing clips[,]” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 18-20.)

32. The ALJ's reliance on hearsay in the form of a non-contemporaneous report prepared by a terminated employee of a non-party rental company to support the notion that “there was a problem with the Xfile 3” at some point during the race, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 23: 12-13.)

33. The ALJ's finding and/or conclusion that “the Respondent cannot successfully claim it would have discharged Hess because of the missing clips, regardless of his union activity, since the Respondent did not actually attribute his discharge to those clips at the time[,]” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 20-22.)

34. The ALJ's finding and/or conclusion that “the uncontested evidence indicates that, both internally and in talking to Hess, the Respondent accepted Hess's explanation that the clips were missing because of an equipment malfunction[,]” on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 24: 22-24.)

35. The ALJ's failure to fully consider the significance of Hess not playing four pre-recorded video clips, including a two-minute clip of particular importance to NHRA's main sponsor, during a live television broadcast, on the grounds that these facts, as established by the record, strongly support the Respondent's justification for Hess's immediate termination. (JD 21-24.)

36. The ALJ's reliance on a possible equipment malfunction to excuse Hess's failure to play four pre-recorded video clips, while ignoring the fact that irrespective of any malfunction, Hess failed to perform his job and mitigate the damage that missing clips would inevitably cause during a live broadcast, on the grounds that these facts, as established by the record, strongly support the justification for Hess's immediate termination. (JD 21-24.)

37. The ALJ's finding and/or conclusion that "[s]ince Hess was unlawfully discharged, his challenged ballot should be counted[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 35; 2: 11.)

**Exceptions to the ALJ's Findings Relating to Alleged Violations of Section 8(a)(1)**

NHRA takes exception to:

38. The ALJ's finding and/or conclusion that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by "soliciting employee grievances during a union campaign and impliedly promis[ing] to fix them," on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 12-16; 2: 9-10; 18: 9-10; 18: 40-41.)

39. The ALJ's finding and/or conclusion that "the manner in which the Respondent addressed employee concerns in response to the organizing campaign was considerably different than anything it had done in the past[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 18: 48-50.)

40. The ALJ's finding and/or conclusion that the presence of Respondent's CEO and its Vice President of Human Resources at the Charlotte II race "would suggest" to employees that Respondent "was taking their complaints more seriously as a result of the organizing drive[.]" on

the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 19: 1-5.)

41. The ALJ's finding and/or conclusion that, while employees had voiced concerns and complaints early in the season, the Respondent did not seek to address those concerns "until the Union arrived on the scene months later[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 19: 4-6.)

42. The ALJ's finding and/or conclusion that employees would "understand the Respondent to be signaling a more receptive approach to resolving employee complaints if they rejected the Union as their bargaining representative[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 19: 10-12.)

43. The ALJ's finding and/or conclusion that Marleen Gurrola, Respondent's Vice President of Human Resources, "unlawfully solicit[ed] grievances as a carrot for not unionizing[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 19: 37-38.)

44. The ALJ's finding and/or conclusion that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) by "creat[ing] the impression among employees that their union activity was under surveillance" when Gurrola spoke to a group of employees at the Charlotte race, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 19: 46-48; 20: 36-38; 27: 12-19.)

45. The ALJ's finding and/or conclusion that "employees could reasonably believe from Gurrola's comments and [Director Jim] Sobczak's presence outside the most recent Union meeting that their activity was under surveillance[.]" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 20: 30-32.)

46. The ALJ's finding and/or conclusion that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by "advis[ing] employees they could not be rehired for the 2017 season until the election was held and, if the Union won the election, bargaining was conducted and completed" on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law. (JD 27: 12-23; 21: 17-21.)

47. The ALJ's findings and/or conclusions that Technology Executive Michael Rokosa's email stating that employment offers would be delayed until after the Union election was not compatible with Board law; that Respondent was "legally entitled to make job offers whenever it desired upon employees' previous terms and conditions of employment[,]" on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 21: 9-17.)

48. The ALJ's findings and/or conclusions that the "email as written would give employees the false impression that they could not be rehired immediately because the Union petitioned for an election and, if the Union won, they would be subject to an additional indefinite delay[,]" and his characterization of the email as "a powerful and inaccurate antiunion message[,]" on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 21: 9-17.)

### **Additional Exceptions**

NHRA takes exception to:

49. The ALJ's credibility determinations throughout the Decision, as well as his justification for same, as his determinations are not supported by the record and are erroneous as a matter of law. (JD 3: fn 1; *passim*.)

50. The discrediting of Technology Executive Michael Rokosa based on the ALJ's erroneous review of the record; specifically, his apparent belief that Rokosa testified that he was "on the phone call as a witness while Skorich notified Hess of his discharge" (JD 10: 12; 10: fn 14) and his finding that Rokosa's credibility was therefore in question because Rokosa had "recall[ed] a conversation in which he did not participate[.]" (JD 10: fn 14), on the grounds that this misstates Rokosa's testimony and is contrary to the record evidence.

51. The ALJ's finding and/or conclusion that Respondent did not explain its reasons for not calling Producer Peter Skorich to testify at the hearing, and his subsequent findings that this failure undermines the credibility of all other witnesses and suggests Respondent presented a pretextual defense, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 23: 35-39.)

52. The ALJ's reliance on Hess's testimony about the event resulting in his termination, including his characterization of management as "not react[ing] as though the matter was of significant concern[.]" as well as Hess's description of the order of events, on the grounds that these findings and/or conclusions are not supported by the record and are erroneous as a matter of law. (JD 8: 16-18; 9: fn 13; 23: 34-35.)

53. The ALJ's Remedy and Order on pages 27-30 of the Decision, as his conclusions/findings/recommendations are not supported by the record and are erroneous as a matter of law.

## CONCLUSION

For the foregoing reasons, NHRA respectfully requests that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto, and that a rerun election be ordered in this matter.

Submitted this 7<sup>th</sup> day of December, 2018.

*X Daniel P. Murphy X*

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent National Hot Rod Association's Exceptions to the Decision of the Administrative Law Judge, which was filed today using the Board's electronic filing system, was served on the following persons by electronic mail:

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Submitted this 7<sup>th</sup> day of December, 2018.

*X Daniel P. Murphy X*

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